MISCELLANY.

Flaws in the Common Law.*—I wish to preface what I have to say by observing that I claim, in my humble way, to be second to no one in my admiration for our ancient common law and our case-law system which is inseparably connected with it; and no one rejoices more than I do that the attempt made in the reign of King Henry VIII. by Reginald Pole, the King's cousin, to have the common law superseded by the civil law came to nothing. Therefore when I speak of flaws in the common law, I speak as one might speak of flaws in a diamond.

Nevertheless there are certain features and doctrines in the common law so contrary, in my opinion, to common sense, justice, reason, and humanity, or one of them, that I can suggest only one explanation of the fact that they have been allowed to continue generation after generation and century after century. Just as it is recognized as a common defect of Englishmen, that they know no language but their own, so it is, I think, a common defect of British lawyers everywhere that they study no system of law but their own. For my own part circumstances have led, during the last few years, to my acquiring a certain elementary knowledge of Roman law and the modern civil law systems built upon it; and in nearly every one of the cases to which I desire to refer this morning, the rule of the civil law is different to that of the common law.

The first point to which I wish to call your attention is the unlimited freedom of testamentary bequest regardless of claims of family. If a man be of sound disposing mind he is at liberty, however wealthy he may be, to leave his family destitute, and devise and bequeath his whole estate to a home for lost dogs, save only, in Ontario, but not in England, a wife's right to dower in his freehold lands. So far back as in the 4th edition of his Commentaries, published in 1770 (pages 449-450), Blackstone says:

"Our law has made no provision to prevent the disinheriting of children by will; leaving everyman's property in his own disposal upon a principle of liberty in this, as well as every other action; though, perhaps, it had not been amiss, if the parent had been bound to leave them at the least a necessary subsistence."

And he adds:—

"By the custom of London indeed (which was formerly universal throughout the kingdom) the children of freemen are entitled to one-third of their father's effects to be equally divided among them; of which he cannot deprive them."

Roman law recognizes no such liberty to disregard the claims of family. So much did it regard the rights of children that even a

*This paper was read by Mr. A. H. F. Lefroy, K. C., at the meeting of the Ontario Law Society at Osgoode Hall, Toronto, on February 22nd, 1918.

gift made *inter vivos* by a childless donor was revocable by subsequent birth of a child (Code 8, 55 (56), 8); and this is followed in the modern law of France, Italy, Spain, Porto Rico, Austria, Mexico, Chile, and Argentina (Sherman, Roman Law in the Modern World, vol. 2, p. 227).

As to testamentary power, from very early times, at Rome, a man's power to will away his property was confined to three-fourths of his estate, each child being entitled, in spite of the provisions of his father's will, to one-fourth of what he would have received on intestacy, unless disinherited on certain specified grounds. In default of children a similar right attached to parents. This was known as the *quarta legitima.* As a recent writer says:—

"Roman law justly and wisely looked upon this disfavour and regarded as pernicious to the welfare of the family, all testamentary dispositions of property which beggar children or parents in favour of strangers to the blood." Sherman's op. cit. vol. 2, p. 268.

And the Roman rule in this respect lives on in the modern civil law systems of France, Italy, Spain, Germany, Louisiana, and Scotland. In the last two, at all events, it retains the Roman term of *"legitim."* In Scotland the rule is that a child has a right to succeed to one-third of the whole free movable estate of the last deceasing parent which is called the *legitim.* It is to be noticed that in Scotland the rule does not extend to lands. In France it is more general. Section 913 of the French Civil Code provides:—

"A man can only dispose of a half of his property by gift *inter vivos* or by will if he leaves a legitimate child surviving him. If he leaves two children he can only dispose of one-third. If he leaves three or more he can only dispose of a quarter."

The Code of Louisiana, §§ 1493, 4, 5, has almost identical provision; nor does it allow gifts *inter vivos* or *mortis causa* to exceed two-thirds of the property, if the donor, having no children, leave a father, or mother or both. The modern German law is similar. As already stated certain expressly defined grounds will justify disinherison. These in the modern system, as in the old Roman, are such as assaulting the parent or attempting his life; or willful failure of duty as to the testator's maintenance; or leading an immoral life, Hunter's Roman Law, 4th ed., p. 263; Schuster's Principles of German Civil Law, p. 632.

The next point which I wish to refer to is our persistent refusal to admit the legitimation of children by the subsequent marriage of their parent. Legitimation *per subsequens matrimonium* was always the rule of the Roman law. We have not advanced one whit beyond the position of the Barons of England who, in the Statute of Merton of 1236, pronounced their famous—or should we rather say, infamous —dictum on this very point, *"nolumus leges Angliæ mutari."* In other words, they rejected it apparently mainly because it was a foreign law: Sherman *op. cit.* § 493. It is otherwise in France, Italy, Spain,

Japan, Louisiana, Scotland, and Germany, while in the United States one-fourth of the States have abrogated the common law rule, and turned by statute to the just and merciful rule of Roman law; namely, New York, Ohio, Pennsylvania, Massachusetts, Alabama, Indiana, Kentucky, Texas, Vermont and Virginia. If you refuse to legitimate children by the subsequent marriage of their parents, you visit the sins of the father upon the children, and take away from the father the chief inducement to do the only thing he can to atone for the wrong he has done by making the mother an honest woman.

I will now proceed to a different field, and I would like to make this preliminary remark. If a special interest attaches to autochthonous systems of law, as I think it does, in this that they indicate deep seated racial characteristics, the common law seems to indicate one British characteristic to be a tendency to run good principles into the ground. Freedom is a good principle, the very best, for the maintenance of which we are prepared to risk everything we have,—and yet it seems running it into the ground to allow a man, without adequate reason, to leave his children paupers. So *caveat emptor*, let the purchaser look out for himself, is no doubt an excellent general principle, but it is surely carrying it too far to say that if a man sells horses, or cattle, or other goods, which are subject to latent defects, of which he himself is perfectly aware, and of which he knows that the purchaser is not aware, the sale nevertheless holds good, and no liability to damages results, so long as the vendor makes no kind of representation. Such a rule I submit condones what is obviously dishonesty. In the well-known case of Ward *v.* Hobbs (1878), 4 App. Cas. 13, 3 Q. B. D. 150, in which the House of Lords unanimously affirmed the decision of the Court of Appeal, Hobbs sent to a public market certain pigs to be sold by auction. True, the conditions of sale provided that the vendor would not warrant them, and that they were open to inspection of intending purchasers, who must take them with all faults. Still Hobbs knew that his pigs were infected with the germs of typhoid, a fact not discoverable on inspection, in order words, a latent defect. Ward bought the pigs, put them with other pigs of his own, which became infected, and the majority both of the pigs bought at the sale, and of the other pigs, died as a result. Ward sued Hobbs to recover damages for the loss sustained, and it was held that he had no remedy under the law. I may take two sentences of Lord Selbourne's judgment as stating the law. He says:—

"The argument which for some time most weighed with me was that for a man to sell to another, without disclosing the fact, an article which he knows to be positively noxious, and which the other man does not know to be so (even though he expressly negatives warranty, and says that the purchaser must take his bargain with all faults) is an actionable wrong. I confess I should not be sorry if the law were so; but I know no authority for the proposition that

such is the law, even with respect to the particular case of infectious disease in animals sold."

Roman law from very early times by the edict of the Aediles, who had charge of the markets and the interpretation given to it by the jurists, was very different: Hunter's R. L., pp. 498-503. It was that a vendor must, at the option of the purchaser, either suffer the sale to be rescinded, or give compensation, if the thing sold had faults (even though unknown to the vendor) that interfered with the possession and enjoyment of it. While if the vendor knew of the faults and concealed them, he was guilty of fraud, and liable even to consequential damages. If action was taken within six months the sale could, even if the vendor did not himself know of the latent defects, be set aside; and if action was taken within twelve months damages could be obtained. Thus in Roman law the seller was held to warrant the thing sold, whether movable or immovable, to be free from latent defects or secret faults. And this Roman implied warranty of quality exists today in all the principal systems of modern law, except the English; it is found, for instance, in the law of Austria, France, Germany, Italy, Spain, Argentina, Chile, Quebec, and Louisiana. It will perhaps be sufficient if I quote the provisions in the French Civil Code, and in the Quebec Civil Code. The former provides:—

"The vendor warrants a thing he sells against hidden defects which make it unfit for the purpose for which it was intended, or which render it so much less suitable for being used for such purpose that a purchaser, if he had known of them, either would not have purchased the thing at all, or else would have only given a small price for the same." The Quebec Civil Code provides: "The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them."

Our law, that is, the common law, implies a warranty on the seller's part in, I think, only three cases: (a) where the buyer makes known to the seller the particular purpose for which the goods are required; (b) where goods are bought by description from a seller who deals in goods of the description; and (c) where there is a sale by sample. The consequence is the possibility of such a case as Ward *v.* Hobbs.

And is it not, I would ask, carrying the principle of *caveat emptor* too far for the law to be as Sir Wm. Anson tells us it is in his Law of Contract, 13th ed., 1912, p. 165:—

A. sells X. a piece of china. X thinks it is Dresden china. A. knows that X. thinks so and knows it is not. The contract holds. A. must do nothing to deceive X., but he is not bound to prevent X. from deceiving himself, as to the quality of the article sold.

Is not this, I would ask, plainly condoning downright dishonesty?

It requires a far greater capacity for drawing subtle distinctions than I possess to see that A. in such a case is any better than a common thief.

I hesitate to suggest that it is a flaw in the common law, that it repudiates the Roman law doctrine of *læsio enormis* or "gross wrong." That doctrine was that if the seller or purchaser was prejudiced to the extent of more than half the real value the sale could be rescinded, unless the buyer agreed to pay the deficiency in price. Yet this rule of Roman law has descended into modern law in France, Italy and Louisiana, among other places. But in France and Louisiana, at all events, the doctrine is confined to sales of land. The French Civil Code, § 1674, provides:—

"If the vendor of an immovable object has been damaged by receiving seven-twelfths less than its true price he has the right to demand that the sale should be rescinded even though by the terms of the contract itself, he has renounced any right to ask for rescission, and the contract recites that full value has been given."

And that:—

"An action for rescission must be brought within two years of the sale, counting from the date thereof."

It is held under these clauses that the action for rescission for undervalue lies although there be no cheating or undue influence proved. The fact of undervalue to the extent of seven-twelfths in the price is held to imply that there is no true consent; and the action for rescission being based on the damage the vendor has suffered, the purchaser can stop the action by indemnifying the vendor for his loss. The true price is held to be that which *"l'opinion publique"* would put upon it, viz., the fair market price, unaffected by any circumstances peculiar to either vendor or purchaser: Wright's ed. of the French Civil Code p. 317, n. b.; Sherman's Roman Law in the Modern World, II. 343, n. 31.

So by Code of Louisiana, § 2566, "the contract of sale may be cancelled * * * by the effect of the lesion beyond moiety." "If the vendor has been aggrieved for more than half the value of an immovable estate by him sold he has the right to demand the rescission of the sale." § 2589.

No doubt the doctrine of *læsio enormis*, if applied as Roman law applied it to the sale of goods as well as of land, is hostile to commerce; and no doubt our inclination is to say that if a man sells a thing for less than half its value, or a man buys a thing at a price double its true value, more fools they; why should the law come to their rescue? But what about the case of the supposed piece of Dresden china? Was there not a "gross wrong" done to the purchaser by the seller, amounting to positive fraud? And what about the following case which came to my knowledge recently?

A gentleman with a knowledge of French literature and of the value of books found himself looking at a counter outside a book-

seller's shop not a hundred miles from here, covered with old second-hand books, and bearing the superscription "any of these books can be bought for 50c." He picked up a copy of Corneille's poems, and saw it was a first edition, of which he knew the value to be several hundred dollars. As a fact I am told the last copy sold by auction fetched $800. He honestly paid his 50 cents and carried off the book. Was there not "gross wrong" here done to the seller? I submit that the fact that the bookseller may himself have bought the book from some one else equally ignorant with himself of the true value is nothing to the point.

Might not the law very well be that if buyer or setler be proved to have known at the time of sale that the other party was ignorant of some essential quality of the thing sold greatly affecting its value, and takes advantage of this ignorance, he shall be compellable either to rescind the sale and refund, or pay compensation?

One more matter I wish to refer to before I close, and one which, so far as I know, takes us quite outside Roman or civil law. It is no doubt an excellent general principle to regard husband and wife as one; but is it not running it into the ground to hold, as the common law appears to do, that no criminal agreement to which they are the only parties can amount to the crime of conspiracy, 1 Hawk, P. C. c. 72, s. 8; because, forsooth, it takes two to conspire, and husband and wife are one? Is it not running it into the ground to hold, as was held in Reg. *v.* Lord Mayor of London (1886), 16 Q. B. D. 772, that because husband and wife are one, a libel on a wife, published by her husband, constitutes no offense; or to hold, as was held in Wennhak *v.* Morgan (1888), 20 Q. B. D. 635, that it does not constitute publication for a man to repeat a defamatory statement about another person to his own wife,—when I should imagine any sensible man would admit that in fact it is the worst kind of publication? And it seems especially inexcusable that such should be the law, seeing that it is held also to be the law, in Wenham *v.* Ash (1853), 13 C. B. 836, that to communicate to a wife words defamatory of her husband is a publication. And what are we to say of the still existing rule of the common law that a husband is liable for his wife's torts? He is jointly responsible with his wife to the person against whom she has committed the tort: Wainford *v.* Heyl (1875), L. R. 20 Eq. 321. No doubt there was some good reason for this rule before the Married Women's Property Acts, when a wife's property became on marriage virtually the property of her husband, except her separate estate in equity, her paraphernalia, and certain things secured to her under previous statutes. Now that the Married Women's Property Acts secure to a woman on marriage her property as statutory separate estate, what excuse is there for retaining the old rule, which is held nevertheless to be unaffected: Seroka *v.* Kattenburg (1886), 17 Q. B. D. 177, 179; Earls *v.* Kingcote (1900), L. R. 2 Ch. 585; Beaumont *v.* Kaye [1904], 1 K. B. 292. In Cuenod *v.* Leslie [1909], 1 K. B.

880, 889, Fletcher Moulton, L. J., expressed the opinion that the matter should be reviewed by the House of Lords, because, in his lordship's view, the present state of things is highly anomalous. It was different when a husband could say to his wife: "What is thine is mine, and what is mine is my own;" when, according to the old legal joke, in matters of property, the law regarded husband and wife as one, and the husband that one. In those days, as Earle, C. J., said in Capel *v.* Powell, in 1864, 17 C. B. N. S. 743, 748, seeing that all her property was vested in the husband, it would be idle to sue the wife alone—the action would be fruitless.

In conclusion I would submit, with all proper deference, that the Ontario Legislature, relieved as it is of many duties and functions proper to a legislature, by the Dominion Parliament, and of others by the Imperial Parliament, might do worse than appoint a Commission to take evidence and to report whether on these or any other points, our common law ought not to be altered or modified so as to make it even more worthy than it is now, of the respect in which we justly hold it.—Canada Law Journal.

IN VACATION.

Secondary Evidence of Pleasure.—Casey: It's the iligant time Oi had lasht Saturday. Divil a thing can I remember afther 4 o'clock.

O'Brien: Thin how d'ye know ye had a good toime?

Casey: Shure, didn't Oi hear th' cop tellin' the joodge about it on Monday mornin'?—Boston Transcript.

The Reason of the Thing.

But why do folks purfur to to liddigate,
And all deir money spend,
When dey can simply a'bitrate,
And hab a little left to lend?

Well, I don't know what uddehs say,
Dat to dem a'pear dė causes,
But to me, it's jes' Gawd's own 'pointed way
Ob takin' care de lawyehs.

—Will W. Ackerly in "Case and Comment."